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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY, MYRON E. PIERCE, ALFRED P. LOWELL, STUART RAND, FITZ HENRY SMITH, JR., JOHN C. KILEY, ARTHUR D. HILL, GRISWOLD TYNG, EDGAR P. BENJAMIN, ROBERT S. CHASE, MARGARET HACKETT, BERNARD J. ROTHWELL, EDWIN D. FLANDERS, MARGARET T. CLANCY, GODFREY L. CABOT, JOHN E. HANNIGAN, VICTOR VIAUX, CAROLINE EDMANDS, GRACE AGNES MURPHY, SAMUEL ELIOT,

vs.

THE CITY OF BOSTON

JURISDICTIONAL STATEMENT

Pursuant to the provisions of Rule 12 of the Rules of the Supreme Court of the United States the petitioners for the allowance of their appeal in the above entitled suit hereby submit their jurisdictional statement.

I

Statutory Provision Sustaining Jurisdiction

Jurisdiction for the appeal is provided by § 237 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 937 (U.S.C. Title 28, § 344) which reads as follows:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The proceeding is by appeal rather than by writ of error by reason of the provisions of the Act of January 31, 1928, c. 14 §§ 1 and 2, 45 Stat. 54, as amended by the Act of April 26, 1928, c. 440, 45 Stat. 466.

II

The State Statute, the Validity of Which Is Involved

The appeal involves the validity of c. 294 of the acts passed by the General Court of Massachusetts in the year 1946 approved May 14, 1946 and printed commencing at page 230 of the Acts and Resolves of Massachusetts, 1946. This statute reads as follows:

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"AN ACT AUTHORIZING THE CITY OF BOSTON TO LEASE SPACE FOR AN UNDERGROUND GARAGE FOR THE PARKING OF MOTOR VEHICLES UNDER BOSTON COMMON, CHARLES STREET AND THE PUBLIC GARDEN, OR ANY OF SAID PLACES, IN SAID CITY, INCLUDING A TUNNEL FROM COMMONWEALTH AVENUE AT ARLINGTON STREET CONNECTED THEREWITH AND AN UNDERGROUND PASSAGEWAY FROM SAID GARAGE TO TREMONT STREET.

Be it enacted, etc., as follows:

Section 1. It is hereby declared that the free circulation of traffic of all kinds through the streets of the city of Boston is necessary to the health, safety, and general welfare of the public, whether residing in said city or traveling to, through or from said city in the course of lawful pursuits; that in recent years the greatly increased use by the public of motor vehicles of all kinds has caused serious traffic congestion in the streets of the city of Boston; that parking of motor vehicles in the streets of the city of Boston has contributed to this congestion to such an extent as to constitute at the present time a public nuisance; that such parking prevents the free circulation of traffic in, through, and from said city, impedes the rapid and effective fighting of fires and disposition of police forces in said city, threatens irreparable loss in valuations of city property which can no longer be readily reached by vehicular traffic, and endangers the health, safety, and welfare of the general public; that this parking nuisance is not capable of being adequately abated except by construction and maintenance of a garage under Boston Common, and that the enactment of section two of this act is hereby declared to be a public necessity.

Section 2. Any general or special law to the contrary notwithstanding, the city of Boston, acting through its park department with the approval of the mayor, is hereby authorized to enter into a contract with a private corporation for the construction and operation, at the expense of the corporation and without cost to the city, of a garage for motor vehicles under Boston Common

in said city within the following boundaries; Bounded westerly by the easterly line of Charles street; northerly by the southerly line of Beacon street; easterly by the Soldiers and Sailors monument and the westerly perimeter of the Parkman bandstand; southerly by the Central Burying Ground; together with all necessary and convenient approaches above and below ground; provided, that on the Charles and Beacon Street frontages combined there shall be an average setback of not less than ninety feet, except at the points of ingress and egress and except that the lessee and contractors employed by the lessee may be permitted to cross and recross said setback during the period of construction at such other points as may be approved by the park department; and of an underground passageway from said garage with entrance and exit at or near the corner of West and Tremont streets for the convenience of persons employed in or using said garage; and to grant a lease for such purposes to such corporation for a term of not exceeding forty years, subject, however, to the following terms and conditions:

(1) The construction contract and the plans and specifications of the project in detail shall be attached to and made part of the lease.

(2) The carrying out of the construction contract shall be guaranteed by a surety bond in the full amount of the contract, executed by a surety company authorized to do business in the commonwealth having a capital and surplus of not less than five million dollars.

(3) The lessee shall pay for the use of the rented premises a rental equivalent to not less than two per cent of its gross receipts.

(4) The contract shall require completion within not more than three years from its date, and the lease may be subject to termination in case of breach of this or any other terms and conditions of the contract or the lease.

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(5) The contract shall require that the work of construction be so carried on that the gardens, lawns, trees and shrubs in the area will, after construction, remain in, or be restored to, substantially the same condition as prior to construction, except at the points of ingress and egress, and that the filling or relocation of the Public Garden pond, or any part thereof, will not be required.

(6) The lease shall not be assignable without the consent of the park department with the approval of the mayor.

(7) At the termination of the lease, the garage, passageway, and the tunnel if included in the lease, and all improvements and appurtenances connected therewith shall become the property of the city of Boston.

(8) The contract and lease may contain such further terms and conditions not inconsistent with the foregoing as the park department and the mayor may approve or require.

Said city acting as aforesaid is hereby further authorized in such contract and lease and subject to the foregoing conditions to permit the lessee to construct a two-lane traffic tunnel under said Garden, Charles street and Common from Commonwealth avenue at or near Arlington street to said garage, within boundaries substantially as follows: Beginning at a point on Commonwealth avenue at about midway between Arlington street and Berkley street and running in an easterly direction on and under Commonwealth avenue, and under Arlington street, the Public Garden and Charles street at a location on Charles street approximately midway between Beacon and Boylston streets to the proposed garage, so located as not to disturb the Washington monument or the bridge over the Public Garden pond; and subject to the further conditions that the fulfilment of any contract authorizing the construction of such tunnel shall be guaranteed by a surety bond executed by a surety company authorized to do business in the commonwealth having

a capital and surplus of not less than ten million dollars, and that the design of the tunnel and its approaches, including the means of ventilation, shall have received the approval of the department of public works and of the transit commission of said city.

Section 3. This act shall take effect upon its passage."

III

The decree of the Superior Court for Suffolk County sought to be reviewed was entered June 7, 1948 pursuant to rescript from the Supreme Judicial Court dated May 17, 1948, a petition for rehearing addressed to the Supreme Judicial Court having been denied on June 3, 1948. A copy of the opinion rendered by the Supreme Judicial Court on May 17, 1948 is annexed hereto.[1] No further opinion was rendered in connection with the application for rehearing.

The petition for appeal is presented herewith on August 6, 1948. The application is made to the Chief Justice of the Superior Court rather than to the Chief Justice of the Supreme Judicial Court, which is the highest court of the Commonwealth of Massachusetts, for the reason that the decree sought to be reviewed, although entered pursuant to directions of the Supreme Judicial Court, is entered in the Superior Court and is the decree of that court.

Central New England Railway Company v. *Boston & Albany Railroad Company*, 279 U. S. 415, 417.

IV

Nature of the Case and the Ruling Which Gives Jurisdiction

The above entitled case is a bill in equity brought under the provisions of Massachusetts General Laws (Ter. Ed.)

[1] (Clerk's Note.—The opinion is printed as an appendix to the Statement as to Jurisdiction in *Pierce, et al.* v. *City of Boston*, No. 324, and is not reprinted in this Statement.)

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c. 214, Par. 3, Clause 11, to enforce a municipal trust and to prevent a diversion of the subject matter of the trust purportedly permitted to the defendant trustee by the provisions of St. 1946, c. 294 which is contrary to the obligation of the trustee under the terms of the trust.

The suit is one of three companion cases tried together and decided in a single opinion of the Supreme Judicial Court, a copy of which is annexed, and it is necessary to refer to the two companion cases as well as the above entitled case for a full understanding of its nature. The above entitled case is the last of the three in point of time.

The first case, referred to by the Supreme Judicial Court as the "Lowell case" was a statutory petition brought under G. L. (Ter. Ed.) c. 40, Par. 53 to restrain the alleged illegal expenditures of money by the respondent city. The theory of the petition was that the city holds Boston Common subject to trusts for the benefit of its inhabitants and the public; that it would constitute a breach of those trusts to permit the construction and operation by a private concern of an underground garage within the limits of the Common; that the city would incur obligations requiring expenditures through this action; and that since St. 1946, c. 294 purports to impair the obligation of contract inherent in the trust, those expenditures would be illegal. No appeal has been claimed in the *Lowell* case, since the Supreme Judicial Court determined that the statute did not contemplate or authorize any expenditure of funds by the city, and it is conceded that no federal question is presented with reference to this feature of the construction of the statute. The *Lowell* case stood or fell on the question of expenditure by the city.

In the second case, referred to by the Supreme Judicial Court as the "Pierce petition", it is alleged that the city since 1634 has held title to Boston Common in trust for the benefit of its inhabitants; that from time to time during the

past three centuries gifts have been made to the city for Boston Common including the residuary legacy under the will of George F. Parkman amounting to the sum of $5,000,000. Under that will the income was to be "applied to the maintenance and improvement of the Common and the Parks now existing." The will was dated 1887. The will further provided that "this bequest is made to the City of Boston in the hope and expectation that the Boston Common shall never either in whole or in part be diverted from its present use as a public park for the benefit and enjoyment of its citizens." It also provided that the city was to notify the executors of acceptance or rejection of the gift within a year, and there were gifts over "should the City of Boston not consider it expedient to accept the bequest for the above purposes." It was further alleged in the petition that the city proposes to divert the Boston Common from its established use as a park subject to said trusts.

In its answer the city admitted that it intended to act pursuant to the authority conferred by St. 1946, c. 294 and by way of counter claim asked the entry of a declaratory judgment declaring that St. 1946 c. 294 was constitutional and in effect that the city held title free of trust.

By their petition in the above entitled case, referred to by the Supreme Judicial Court as the "McCarthy petition", the petitioners seek to enforce the terms of the Parkman trust alone. In it they allege the provisions of the Parkman will quoted above, the uses to which the Common had been put from time immemorial and which were those referred to in the Parkman will, and that the city proposes to put the Common to uses which will frustrate the terms and purposes of the Parkman gift. The city in its answer admitted the acceptance of the Parkman Trust, admitted the uses to which it intended to put the Common, and justified under St. 1946, c. 294, alleging that thereby no breach of that trust would take place and that "the obligations im-

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posed upon the City by its acceptance of the Parkman gift" would not be impaired.

The issue tendered consequently was whether action by the city pursuant to St. 1946 c. 294 would constitute a breach of its obligation as a trustee by reason of the trust on which it held title to the Common. The decision of the Supreme Judicial Court was that the city held title subject to no trust, but subject only to an easement, and that the provisions of the Parkman will quoted above relative to the continuance of the then existing use of Boston Common were precatory only. The opinion concluded on this point:

> "We are of opinion that the proposed use of these areas will not constitute a breach of any mandatory and essential provision as distinguished from any directory and precatory provision contained in the Parkman trust."

It is thoroughly established that in determining whether a state statute violates the contract clause of the Federal Constitution, the question of construction of the obligation is one solely for the Supreme Court of the United States and that that Court is not in any way bound by the construction adopted by the state court.

Irving Trust Company v. *Day*, 314 U. S., 556, 561.

> "When this Court is asked to invalidate a state statute upon the ground that it impairs the obligation of a contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court."

U. S. Mortgage Co. v. *Matthews*, 293 U. S. 232, 236.

> "It is well established doctrine that where the contract clause is invoked this Court must determine for

itself the nature and effect of the alleged agreement and whether this has been impaired."

Shriver v. *Woodbine Savings Bank*, 285 U. S. 467, 475.

"Where legislation is assailed as impairing the obligation of contract, this Court, in defining the scope of the constitutional immunity, will determine for itself what the contract is for whose protection the immunity is invoked."

Hale v. *Iowa State Board of Assessment and Review*, 302 U.S. 95, 101.

A very great number of cases to the same effect are collected in a footnote in *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163 at 167.

It is elementary that the fiduciary obligation of the trustee of a public trust is within the protection of the contract clause and that a statute which purports to authorize or direct the trustee to permit what otherwise would be a breach of trust falls within the condemnation of that clause.

Cary Library v. *Bliss*, 151 Mass. 364.

The existence of the Parkman Trust, and consequently of the city's fiduciary obligation to carry out all of its terms, was admitted in the pleadings and recognized by the Supreme Judicial Court. No question of *cy pres* was suggested by anyone. There was no possible room for any difference of opinion but that the proposed use of the Common was wholly foreign to the uses referred to in Mr. Parkman's will. The sole question was whether the provisions of the will in question were mandatory or precatory. It is not in question that the city proposes to disregard them, or that it relies upon St. 1946 c. 294 as justifying that disregard. If the provisions are mandatory, as we submit, St. 1946 c. 294 in purporting to permit their disregard

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impairs the obligation of contract. If they are precatory, as the city asserts, there is no enforceable obligation to be impaired and so St. 1946 c. 294 escapes the condemnation of the contract clause. Whether they are mandatory or precatory constitutes a clear federal question upon which we are entitled as of right to the decision of the Supreme Court of the United States.

V

Fashion in Which the Federal Point Was Raised

The constitutionality of St. 1946, c. 294 was raised initially by the pleadings in all of the three companion cases. Specific mention of the contract clause was contained in the petition in the *Lowell* case. There it was alleged unequivocally that the statute was in contravention of § 10, Article I of the Constitution. In the *Pierce* case the petition alleged the ancient trust and the city's intention to violate it, and the city joined issue by its prayer for a declaration that the statute was constitutional. In the above entitled case there are flat allegations of proposed disregard of provisions of an admitted trust and the parties met squarely on the question of whether the erection of a garage pursuant to St. 1946 c. 294 would impair the obligations imposed on the city by its acceptance of the Parkman gift.

At the trial in the Superior Court before Mr. Justice Hanify counsel for the petitioners argued the federal question at length relying principally on *Cary Library* v. *Bliss*, 151 Mass. 264, *supra*, and a brief was filed in which that case was discussed. Following the arguments Mr. Justice Hanify handed down careful findings of fact in which at the end he referred to the earlier cases dealing with the Common and he concluded as follows:

In none of these cases does it appear that the Supreme Judicial Court had before it a record containing such an exhaustive history of the Common as the present record affords or a user of the character contemplated by the Statute here in issue.

Reservation and Report

Under these circumstances and *also because a constitutional question is presented* I reserve and report these cases for the consideration and determination of the Supreme Judicial Court on the pleadings, the evidence, my rulings and exceptions thereto and my findings of fact; such decrees to be entered as justice and equity may require." (Emphasis supplied.)

The point was further argued at length in the briefs of all counsel and in the brief of the *amicus curiae* before the Supreme Judicial Court. The binding effect of the *Cary Library* case again was the focal point of the argument.

It is established under Massachusetts equity practice that requests for rulings are inappropriate and have no technical standing. Consequently no requests for rulings of law were filed.

Boston v. *Dolan*, 298 Mass. 346, 349.

VI

The Questions Involved Are Substantial

Boston Common is probably the oldest public park in the United States. Through the years, by reason of its association with events in the history of this country, it has acquired a significance wholly unique among city parks, has come to signify concepts which are entirely distinct from the dirt, grass, trees, cement and mortar of which it is physically compounded, and has woven itself into the fabric of American history, and in the minds of many has taken on an almost sacrosanct quality. We contend that its

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peculiar qualities and position are assured by trusts and that the fiduciary obligation of the city under those trusts is beyond the reach of the fluctuating wisdom and folly of successive legislatures. Whether the words he chose were appropriate or fumbling, there can be no doubt that Mr. Parkman intended to protect the Common as he knew it and gave $5,000,000 for that purpose. Few questions could be more substantial to a great many people in whose daily lives Boston Common plays a part than the question of whether they truly are beneficiaries of a trust with reference to the Common or whether their enjoyment of it and their affection for it are subject to the pleasure of whatever legislature chances to be sitting on its border. This feeling, we believe, is likewise shared by many from cities and towns far removed from Boston who have visited the Common and treasure their visit as a vicarious participation in the history of their country. If, as we assert, the Common is held upon a trust, each one of those persons is entitled to look with secure confidence to the guaranty of the contract clause of the Federal Constitution to preserve the Common from invasion and the trust from spoil.

The question of the existence or the non-existence of a trust is undoubtedly substantial in the legal sense. The Massachusetts court has struggled with the problem of the public rights in the Common in a considerable number of cases of which this is the latest. Its varying pronouncements through *Steele* v. *Boston,* 128 Mass. 583; *Veale* v. *Boston,* 135 Mass. 187; *Commonwealth* v. *Davis,* 140 Mass. 485; *Lincoln* v. *Boston,* 148 Mass. 578; *Prince* v. *Crocker,* 166 Mass. 347; *Codman* v. *Crocker,* 203 Mass. 146; *Commonwealth* v. *Gilfedder,* 321 Mass. 335; and the instant case are not altogether harmonious. It is our submission that the latest pronouncement of that court is based on a serious misconstruction of the Parkman will. It is a matter of some

chagrin that it is necessary for the partisans of the Common and the beneficiaries of the Parkman Trust to appeal from a Massachusetts court even to a court of the United States for what they concede to be their rights. But in questions arising under the Constitution of the United States, and the construction of the trusts here involved does arise under that Constitution, the Supreme Judicial Court of Massachusetts is an inferior court. Hence this appeal.

The amount of money held in the trust which we assert is to be broken is certainly substantial. The principal is some $5,000,000 and over the years the income has amounted to some $7,500,000. The discussion by the Supreme Judicial Court of the effect of the words "in the hope and expectation" is, it is submitted, wholly inadequate. It fails to take adequate account of the provision in the will requiring the city to decide whether acceptance of the gift would or would not be expedient. It emphasizes "hope" to the exclusion of "expectation." It fails to give due effect to cases like *Warner* v. *Bates*, 98 Mass. 274, holding the words "in full confidence that" mandatory; and cases like *Colton* v. *Colton*, 127 U. S. 300, holding the word "request" mandatory. The opinion apparently leaves the city to enjoy the Parkman money to the exclusion of the legacies over while completely disregarding the words with which Mr. Parkman hedged his gift.

We submit that the petitioners are entitled as of right to review by the Supreme Court of the United States and that they are amply justified in considering themselves entitled in conscience to urge their contentions on that Court both on behalf of themselves and on behalf of the public as contentions of the greatest substance.

FRANK W. GRINNELL,
RICHARD WAIT,
Counsel for Appellants.

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Supreme Court of the United States.

OCTOBER TERM, 1948.

No.

ANNA C. McCARTHY

v.

CITY OF BOSTON.

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

This brief is submitted pursuant to the provisions of paragraph 3 of Rule 7 in opposition to the appellee's motion to dismiss or affirm. That motion is based upon the proposition that the court is without jurisdiction, which is elaborated in the appellee's statement opposing jurisdiction. The appellants' position that the court has jurisdiction is set forth in their jurisdictional statement. An attempt has been made not to duplicate here what appears in that statement. Consequently this brief is in the nature of a reply to the appellee's statement opposing jurisdiction.

Statement of the Case.

The case is a bill in equity brought pursuant to Massachusetts General Laws (Ter. Ed.) c. 214, § 3 (11), to enforce a municipal trust and prevent an alleged projected breach of that trust. The theory of the petition is that

the appellee holds property under trusts declared in the will and codicil of George Francis Parkman; that those trusts require the use of the trust property for the maintenance and improvement of Boston Common (title to which is also held by the appellee) for the uses to which it was put at the date of the will; that the City, pursuant to the supposed authorization contained in Massachusetts St. 1946, c. 294, proposes to divert the Common from those uses by turning nearly half of it into an underground garage, and consequently to commit a breach of trust. The appellee does not deny that it holds the Parkman fund in trust. It has, however, maintained the position that the trust imposes on it no obligation to continue the Common in the uses referred to in Mr. Parkman's will and that the construction of the garage, all as provided in the statute, will not constitute a breach of trust.

The Parkman will (Exhibit 28) by paragraph 43 devised the residue of the estate to the City of Boston and by a codicil provided that the income of the residuary fund should be applied by the City "to the maintenance and improvement of the Common and the Parks now existing . . ." It was further provided in paragraph 43:

> "This bequest is made to the City of Boston in the hope and expectation that the Boston Common shall never be either in whole or in part diverted from its present use as a public park for the benefit and enjoyment of its citizens."

There were further provisions that the City should notify the executors within a stated period of "its acceptance or rejection of this bequest" and there were gifts over in the event the City should "not consider it expedient to accept the bequest for the above purposes."

St. 1946, c. 294 (which is copied in full in appellants' jurisdictional statement), purports to authorize the City

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to lease a substantial portion of Boston Common to a private corporation for the construction of an underground garage the construction of which, as found by the trial judge, will take some three years, during which period the public will be excluded from a substantial part of the Common and following which it will still be excluded from those portions which are to be used as approaches to the garage. In paragraph 5 of the petition the appellants allege that the appellee proposes to use the Common in such fashion as to derogate from the obligations of the Parkman trust. In its answer to this paragraph the appellee "admits that it intends to exercise the authority conferred upon it by St. 1946, c. 294, but says that the terms of the contract and lease provided for by that statute have not yet been determined as agreed upon between the parties. The Respondent [appellee] denies that the execution of said contract and lease will in any way impair the obligations imposed upon the City by its acceptance of the Parkman gift."

The issue presented, therefore, was whether action by the City taken under the 1946 statute would constitute a breach of an admitted trust.

The case was tried with two companion cases, one known as the *Lowell* case, which is not before this court, and the other known as the *Pierce* case, in which an appeal has been taken to this court. The trial judge found

> "All three bills are brought as a result of the City's intention to exercise the authority granted by Chapter 294 of the acts of 1946"

and that

> "The City . . . is accepting the authority granted by said act and intends to exercise and assert such authority."

He further found the terms of the Parkman will and the establishment of the testamentary trust with the City as the trustee. He likewise found the facts with reference to the use to which the Common has been put for three centuries, and concluded:

> "Under these circumstances and also because a constitutional question is presented, I reserve and report these cases for the consideration and determination of the Supreme Judicial Court . . . such decree to be entered as justice and equity may require."

The Supreme Judicial Court decided all three cases in one opinion. After a description of the cases the court proceeded to a lengthy examination of the state of the title under which the City held the Common. It concluded that title to the Common was not held by the City in trust. With reference to the trust under the Parkman will, the court (pages 632-635 of the Opinion) concluded that, although a trust was in fact created, as matter of construction the provision that the bequest was made

> "in the hope and expectation that the Boston Common shall never either in whole or in part be diverted from its present use as a Public Park for the benefit and enjoyment of its citizens"

was not mandatory and did not impose

> "a limitation or condition which constituted an integral and essential part of the trust" (Opinion, p. 635, Mass. Adv. Sh. 1948).

It concluded:

> "We are of opinion that the proposed use of these areas will not constitute a breach of any mandatory

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> and essential provision as distinguished from one of 'hope and expectation' such as contained in the Parkman trust'' (p. 635)*

and ordered the entry of a decree dismissing the bill, and such decree was duly entered in the Superior Court. The present appeal followed.

The Appellee's Position.

In arguing against the court's jurisdiction the appellee asserts that since the state court ordered the bill dismissed solely on the ground that the trust relied upon by the appellants was not made out, it did not in any way pass upon the validity of St. 1946, c. 294, and that since the pertinent appellate jurisdiction of this court is limited to cases

> ''where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity,''

the appeal will not lie, since there was no decision in favour of the validity of the statute.

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*This sentence was changed by the court after the publication of the Advance Sheets. Unfortunately, we quoted the sentence as it originally appeared at page 7 of our jurisdictional statement. We were advised of the change by the Reporter of Decisions after the jurisdictional statement had been filed. The change is verbal only, and there is no change of substance or meaning.

Points and Authorities.

THE DECISION OF THE SUPREME JUDICIAL COURT WAS IN FAVOUR OF THE VALIDITY OF THE STATUTE.

The fundamental vice in the appellee's position is that it assumes that the validity of the 1946 statute was not the focal point of the case but was incidental merely. This entirely overlooks the fact, which is the threshhold of the case, that without the statute the City neither could nor would embark upon the particular project which it admitted an intention to carry out.

The suit is in essence one to prevent a breach of trust through the construction of a garage in the Common. There could be no doubt that, in so far as it had power to do so, the legislature had attempted to authorize this action, whether it was a breach of trust or was not. If it would not constitute a breach of trust, the legislature would not be deprived of power to enact the statute by the prohibition of the contract clause of the Constitution. If the proposed action will constitute a breach of trust, then to that extent the statute must fall within the condemnation of the contract clause and was beyond the power of the legislature. The action which the City admitted it proposed to take in its answer was only to exercise the authority granted to it by the statute. Without the statute there could be and would be no garage. As far as the contract clause is concerned, there can be no dispute that a statute authorizing a breach of an existing trust would impair the obligation of a contract. As a consequence, the question of whether the action authorized by the statute and proposed to be undertaken pursuant to that authorization would or would not constitute a breach of trust would determine and would alone determine whether the statute was valid or invalid.

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We do not understand that the appellee denies the proposition developed in our jurisdictional statement that the question of whether a contract right exists which is impaired by the statute constitutes a question for this court. To maintain its position the appellee must establish that the validity or invalidity of the statute was not passed upon by the lower court or implicit in its decree. But where the proposed action which is the sole subject matter of the suit depends entirely upon a statutory authorization, is initiated by the statute, and all steps of which are prescribed by the statute, it is impossible to say that a decree denying an injunction against that action does not involve determination that the statute is valid.

The establishment of the validity of the statute was an essential part of the City's case in the entire litigation, and the court below held that the statute was valid. It is true that it did so in its consideration of the Lowell bill, but the City needed the authority granted by the statute quite as much in its capacity as trustee as it did in its capacity simply as a municipality. If the statute was not valid for any reason, the City could not proceed with the garage project. The plaintiffs in the three cases asserted several other grounds of invalidity as well as the prohibition of the contract clause in the over-all litigation and the court below disposed of all of these other objections and ruled that the statute was valid. The court said in so many words: "We have decided that the statute is valid" (1948 Adv. Sh. p. 635) and without that decision the appellee could not have its garage, trust or no trust. As far as the case at bar is concerned, it is true that the asserted invalidity based upon the contract clause could not come into play until it appeared that there was a contract the obligation of which could be impaired, but if there was such a contract there was no issue between the parties that the statute would impair it.

The authorities are clear that failure of a state court specifically to adjudge a statute claimed to impair the obligation of contract to be valid does not oust this court of jurisdiction. This court will itself determine whether the necessary effect of the state court's decision is to uphold the statute and consequently, in the language of the jurisdictional grant, is in favour of the statute.

McCullough v. *Virginia*, 172 U.S. 102, 122:

> "Now, it is one of the duties cast upon this court by the Constitution and laws of the United States to inquire whether a State has passed any law impairing the obligation of a prior contract. No duty is more solemn and imperative than this, and it seems to us that we should be recreant to that duty if we should permit the form in which a state court expresses its conclusions to override the necessary effect of its decision."

A holding by implication gives jurisdiction quite as fully as an explicit one.

Long Sault Development Co. v. *Call*, 242 U.S. 272, 277:

> ". . . If it did not give effect to that act, either expressly or by implication, this court is without jurisdiction to review its decision, for the reason that the provisions of the Constitution of the United States for the protection of contract rights are directed only against the impairment of them by constitutions or laws adopted or passed subsequent to the date of the contract from which such rights spring, and do not reach decisions of courts construing constitutions or laws which were in effect when the contract was entered into, as has been held by a long line of decisions extending from *Knox* v. *Exchange Bank*, 12 Wall. 379,

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to *Cross Lake Shooting and Fishing Club* v. *State of Louisiana*, 224 U. S. 632.

"In deciding this question, this court is not limited to the mere consideration of the language of the opinion of the state court, but will consider the substance and effect of the decision, and will for itself determine what effect, if any, was given by it to the repealing act."

Columbia Railway, Gas & Electric Co. v. *South Carolina*, 261 U.S. 236, 245:

"But, although the state court may have construed the contract and placed its decision distinctly upon its own construction, if it appear, upon examination, that in real substance and effect, force has been given to the statute complained of our jurisdiction attaches."

Honeyman v. *Hanan*, 300 U.S. 14, 18:

"As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether the federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record."

Walsh v. *Columbus &c. Railroad Co.*, 176 U.S. 469, 475:

"We have repeatedly held that, where the plaintiff relies for his recovery upon the impairment of a contract by subsequent legislation, it is for this court to determine whether such contract existed, as well as the question whether the subsequent legislation has impaired it."

Detroit United Railway v. *Michigan*, 242 U.S. 238, 247:

> "But, in cases of this character, the jurisdiction of this court does not depend upon the form in which the legislative action is expressed, but rather upon its practical effect and operation as construed and applied by the state court of last resort, and this irrespective of the process of reasoning by which the decision is reached, or the precise extent to which reliance is placed upon the subsequent legislation."

See also *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U.S. 561, 580, 581.

In the case at bar the lower court did specifically hold the statute valid. It considered the contract clause argument only to the extent of ruling that there was no contract, but it did make that ruling and it did hold the statute to be within the legislative competence. It follows that the decision in favour of the validity of the statute was both implicit and explicit. Undoubtedly, if the Lowell case had not been before it, the court would not have used the language which appears on pages 628-632 of its opinion, but nevertheless, if the statute was invalid, there could be no garage.

A case which is closely applicable is

Louisiana Railway & Navigation Co. v. *New Orleans*, 235 U.S. 164.

That was a suit by the City to enjoin the railway company from constructing and operating tracks under a City ordinance. Subsequent to the passage of that ordinance a later one had been passed which purported to repeal it. The railway company insisted that the first ordinance gave it a contract right and that the repeal of the first by the

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second ordinance impaired that contract right. The state court held that the first ordinance was subject to a condition and never took effect; consequently it did not come to consider whether the second ordinance impaired the obligation of any contract. On writ of error to this court the City moved to dismiss on the ground that the state court had given no effect to the second ordinance, and consequently that the court was without jurisdiction. The court held, however, that it did have jurisdiction and stated that

> ". . . where the state court does give effect to later legislation which operates to impair the obligation of a contract if one exists, this court is not deprived of jurisdiction because the state court has put its decision upon the ground that the contract was not made, or that it was invalid, or that it has become inoperative. In such a case, this court must determine for itself whether there is an existing contract. Otherwise, although it was the aim of the suit and the effect of the judgment to give vitality and operation to the subsequent law, and this court might be of the opinion that there was a valid contract which thereby would be impaired, it would be powerless to enforce the constitutional guarantee" (p. 170).

Having decided that the court had jurisdiction, the court, however, went on to decide that the construction placed on the first ordinance by the state court was correct and consequently affirmed the judgment.

The situation thus presented is very similar to that in case at bar. The Louisiana court never came to the question of whether the second ordinance impaired a right of contract simply because it determined that no such contract right existed. So here the Massachusetts court never came to consider whether St. 1946, c. 294, violated the contract clause, because it construed the trust as not giving

the contract right asserted. In the cited case New Orleans was endeavouring to act under the provisions of the second ordinance. In the case at bar Boston is proposing to act under St. 1946, c. 294, and patently cannot take the desired action except by reason of that statute. The Louisiana court held that New Orleans might take the action it proposed. The Massachusetts court has held that Boston may take the action it projects. The parallel between the cases is complete. This is further pointed out by a later statement of the court (at page 171):

> "In the present case, it is apparent that the whole object of the suit was to establish the right of the City to carry out the subsequent ordinance, which conflicted with and repealed the earlier ordinance so far as it might be construed to give to the plaintiff in error the particular privileges therein described."

So also here the object of the suit was to prevent the City from carrying out the project specifically authorized by St. 1946, c. 294.

There is no room for doubt that there is a clear conflict between the statute and the trust which we assert. The statute is upheld quite as fully by a decision based on the proposition that no contract obligation existed as it would be if based upon the proposition that the provisions of the statute did not impair a contract right found to exist. Whether there has been impairment or not must be determined by this court, and the state court cannot tie the hands of the court by the fashion in which it makes its decision.

Atlantic Coastline Railroad Co. v. *Phillips*, 332 U.S. 168, 170:

> "A claim that a State statute impairs the obligation of contract is an appeal to the United States Consti-

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tution, and cannot be foreclosed by a State Court's determination whether there was a contract or what were its obligations."

The case of *Bridge Proprietors* v. *Hoboken Co.*, 1 Wall. 116, cited by the appellee in its statement opposing jurisdiction, supports our contention. In that case the defendant in error sought to have the appeal dismissed on the footing that the injury, if any, to the Bridge Proprietors resulted only from the construction placed by the state court on the second statute, but this court pointed out that the construction was not of the second but was of the first statute.

"But there is a misconception as to what was construed in this case by the State court. It is very obvious that the statute of 1860 was *not* construed. No doubt is entertained by this court, none could have been entertained by the State court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. It was then the act of 1790 which required construction, and not that

of 1860, in order to determine whether the latter was valid or invalid" (pp. 144-145).

The parallel between the two cases is close. In the case at bar the 1946 statute just as obviously impaired the obligation of contract, if one existed, as the 1860 statute impaired the obligation alleged to have been created by the 1790 statute. It is also significant that this court affirmed the judgment of the lower court in the cited case and adopted its construction of the 1790 statute, but it nevertheless held that it had jurisdiction over the appeal.

The appellee's suggested distinction that the erection of a bridge requires justification by way of a franchise whereas the construction of a garage is *prima facie* lawful is quite without merit. Turning the public out of a park and converting it into a garage is not *prima facie* lawful. Boston needs the authority of St. 1946, c. 294, to accomplish this quite as much as the Hoboken Company needed a franchise to build its bridge. The appellee certainly recognized this by its prayers in the Pierce and Lowell cases for a declaration that the statute was valid. It is immaterial that it failed to include such a prayer in the case at bar, the absence of power to change the park into a garage without statutory authorization remained the same.

THE APPELLANTS HAVE PROPERLY PRESENTED THEIR POINT.

The appellee's attack on the assignments of error is without merit. In its statement opposing jurisdiction appellee attempts to show that the assignments of error do not properly raise the question. Its argument, however, on this point is entirely subsidiary to its principal argument that the court below did not rule in favour of the statute. The appellee quite properly admits that, where a failure to rule that a contract right exists necessarily

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gives effect to the statute in question, it constitutes a decision in favour of the statute. As has already been pointed out, the decision of the Massachusetts court that action under St. 1946, c. 294, would not entail a breach of trust necessarily constituted a decision in favour of the validity of the statute. The question of the existence or non-existence of the trust and of its construction was a question of law. Under the cases already cited, the decision of that question is clearly one for this court, and the failure to make a proper ruling on that question by the Massachusetts court constitutes a decision by that court in favour of the validity of statute and is properly subject to review upon the present appeal.

Where it is asserted that a statute violates the contract clause there are two possible defenses open, either that there is no contract the obligation of which the statute impairs or that the obligation of an admitted contract does not come within the sweep of the statute. Whichever is chosen, this court has jurisdiction to review if the proposed action pursuant to the statute is permitted. But where the first alternative is selected—as it was here—the appellants' assignments of error must necessarily be for failure to rule. It may be true in metaphysics that error in failing to rule that a statute is invalid is not the equivalent of error in ruling that it is valid, but law cases are intensely practical affairs and a litigant must take his case as he finds it. If an inferior court sees fit to decide a case on the footing that no contract exists, it is ridiculous to say that an appellant fails to show jurisdiction when he assigns as error the precise error which the inferior court has committed—failure to rule that a statute which is essential to the proposed action of the appellee and which confessedly impairs the obligation of the asserted contract is invalid.

EVEN IF THE APPEAL WERE NOT PROPERLY BEFORE THE COURT, IT SHOULD TAKE THE CASE AS UPON CERTIORARI.

Paragraph (c) of U.S. Code, Title 28, § 344, provides,

> "If an appeal be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by a petition for certiorari, this alone shall not be a ground for dismissal; but the papers whereon the appeal was allowed shall be regarded and acted on as a petition for certiorari and as if duly presented to the Supreme Court at the time they were presented to the court or judge by whom the appeal was allowed . . ."

Even if the appellee's position in its statement opposing jurisdiction were correct, this paragraph would apply and the court should, we submit, consider the case on certiorari. The appellee's argument is based wholly upon the proposition that the decision below did not constitute one in favour of the validity of the statute. It does not question that the validity of the statute was drawn in question in the court below on the ground of being repugnant to the contract clause of the Constitution. Paragraph (b) of § 344, which gives power to the court to act on certiorari, does not require that there be a decision in favour of the validity of the statute. The pertinent language in paragraph (b) is: "where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; . . ." The further words appearing in paragraph (a), "and the decision is in favor of its validity," are omitted from paragraph (b). Therefore there can be no question that it is competent for this court to act on certiorari and that a petition for certiorari would have been an appropriate remedy for the appellants.

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A recent case where the court acted under paragraph (c) after holding that the appeal could not lie is *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U.S. 182.

The substantial grounds on which we urge this court to review the decision of the Massachusetts court are set forth in our jurisdictional statement. There is no occasion to repeat them here, but we urge them on the court as ample reasons why the court should consider the case on certiorari in the event that it should not do so on appeal.

Respectfully submitted,

RICHARD WAIT.

Of Counsel:

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY, MYRON E. PIERCE,
ALFRED P. LOWELL, ET AL.,
Appellants,

vs.

THE CITY OF BOSTON

APPEAL FROM THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS FOR THE COUNTY OF SUFFOLK

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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for the City of Boston,
WILLIAM H. KERR,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY, ET AL,

Appellants,

vs.

THE CITY OF BOSTON,

Appellee

STATEMENT OPPOSING JURISDICTION

The City of Boston, appellee in the above-entitled appeal, believing that the matter set forth below will demonstrate that its motion to dismiss or affirm should be allowed, files this, its statement in opposition to appellant's statement as to jurisdiction.

This case was tried in the Superior Court of Massachusetts with two other petitions in equity, *Lowell et al.* v. *City of Boston et al., and Pierce et al.* v. *City of Boston.* Each petition sought to enjoin the City of Boston from contracting with a private corporation for the construction of a garage under Boston Common, and from executing a lease of the garage to said corporation.

The *Lowell* case was brought by more than ten taxpayers, pursuant to Mass. G. L. (Ter. Ed.) c. 40, s. 53, to enjoin the acts referred to on the theory that the City is about to incur

unlawful obligations. Petitioners alleged that the City was about to contract for the said garage pursuant to authority granted it by Mass. St. 1946, c. 294, which petitioners assert to be repugnant to the contract clause of the United States Constitution (Art. I, s. 10), and also to Art. X of the Constitution of Massachusetts.

The *Pierce* and *McCarthy* cases were each brought by more than ten taxpayers, by leave of court granted under Mass. G. L. (Ter. Ed.) c. 214, s. 3, cl. 11. These petitions allege that the City holds legal title to Boston Common upon certain trusts for the public and that the City is about to commit acts in breach of said trusts. Each petition prays that the trust be determined, and acts in violation thereof restrained. Neither petition mentions Mass. St. 1946, c. 294, nor asserts the repugnancy of that statute to United States Constitution, Art. I, s. 10.

The Superior Court, after a finding of facts, reported all three cases, without decision, to the Supreme Judicial Court, whose opinion is a part of the papers herein. The rescript of that court ordered decrees dismissing the bills in all three cases, and, in addition, ordered in the *Pierce* case a declaratory judgment ". . . that the City has title to the Common and the Public Garden subject to an easement in favor of the general public for the purposes of a public park." Decrees were entered in the Superior Court on June 8, 1948, pursuant to the rescript. From those decrees in the *Pierce* and *McCarthy* cases, appeals are now brought to this Court. No appeal was taken in the *Lowell* case.

I. This Court Has No Jurisdiction of This Appeal Unless the Record Shows That the Decision Below Upheld the Validity of Mass. St. 1946, c. 294.

Jurisdiction of this Court in this case is asserted by appellant to exist under the following provisions of section 237 of the Judicial Code, 28 U. S. C. s. 344:

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"A final judgment or decree in any suit in the highest court of a state in which a decision could be had . . . where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon writ of error."

To establish jurisdiction, appellants must show:

(1) That in this suit the validity of Mass. St. 1946, c. 294, ". . . is drawn in question . . . on the ground of its being repugnant to . . ." the contract clause of the United States Constitution, Art. I, s. 10.

(2) That the decree appealed from is a decision in favor of the validity of that statute.

Mass. St. 1946, c. 294, authorizes the City of Boston to contract with a private corporation for the construction, at no cost to the City, of a garage under Boston Common, and to lease the garage to the said corporation for a term not exceeding forty years.

Appellants now claim that the statute impairs the obligation of a contract in violation of U. S. Const., Art. I, s. 10. The contract said to be impaired is an alleged trust for the public subject to which, it is claimed, the City now holds title to the Common.

Plainly, this Court has no jurisdiction of this appeal unless the decision below gave effect to Mass. St. 1946, c. 294.

". . . when the state court, either expressly or by necessary implication, gives effect to a subsequent law of the state whereby the obligation of the contract is alleged to be impaired, a Federal question is presented. . . . But if there be no such law, or if no effect be given to it by the state court, we cannot take jurisdiction . . ."

(*Crosslake Club* v. *Louisiana*, 224 U. S. 632, 638-639).

"This court . . . has no jurisdiction to review a judgment of the highest court of a state, on the ground that a contract has been impaired, unless some legislative act of the State has been upheld by the judgment sought to be reviewed . . ."
(*New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30).

Accord:
Wilson v. *Cook*, 327 U. S. 474, 480-481;
Long Sault Development Co. v. *Call*, 242 U. S. 272, 276-278, 280;
Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 187, 190.
Bacon v. *Texas*, 163 U. S. 207, 226-227;
Kreiger v. *Shelby R. R. Co.*, 125 U. S. 39, 46.

II. Appellants' Assignments of Error, Nos. 1, 2, 3, 4, 5 and 7, Fail on Their Face to State Errors Within the Appellate Jurisdiction of This Court, Because They Fail to State That the Court Below Gave Effect to Mass. St. 1946, c. 294.

Assignment of Error No. 1 goes to the whole decree, completely fails in specification, and must be disregarded. *Stickney* v. *Kelsey*, 209 U. S. 419, 420, *Seaboard Airline R. Co.* v. *Watson*, 287 U. S. 86, 90, 91.

Assignment No. 3 complains of the error of the court below in "failing to rule" that the acceptance by the City of the Parkman bequest created a trust with respect to Boston Common. That assignment states no question within the appellate jurisdiction of this court. The question whether or not a trust arose, and presently exists, is intrinsically within the exclusive jurisdiction of the State court, ". . . unless some legislative act of the State has been upheld . . ." *New Orleans Waterworks* v. *Louisiana Sugar Co.*, 125 U. S. 18, 30; *Bacon* v. *Texas*, 163 U. S. 207, 226-227; *Missouri & Kansas Interurban Ry. Co.* v.

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Olathe, 222 U. S. 187, 190; *Crosslake Club* v. *Louisiana,* 224 U. S. 632, 638-639; *Wilson* v. *Cook,* 327 U. S. 474, 480-481.

Assignments Nos. 2, 4, 5 and 7 are defective for a similar reason. They assert that "the Court below erred in *failing to rule* . . ." that Mass. St. 1946, c. 294, was invalid on various grounds. But section 237 of the Judicial Code, 28 U.S.C., s. 344, does not give this Court jurisdiction because of a "failure to rule" that a state statute is invalid. It gives jurisdiction only where "the decision is in favor of its validity".

This record shows affirmatively that the Court below, without referring to or relying upon Mass. St. 1946, c. 294, found that the acceptance by the City of the Parkman bequest gave rise to no trust of the land known as Boston Common. (Opinion, Mass. Adv. Sh. (1948) pp. 632-635.) Since this finding was fatal to petitioners' case, and in itself, without more, compelled the dismissal of the bill, the Court was never, in this case, required to rule and never did rule upon the validity of Mass. St. 1946, c. 294. It had, in the circumstances shown by this record, no obligation to pass upon the validity of that statute, since the petitioners' failure to prove that the Common is held in trust completely disposed of the case. Its "failing to rule" the statute invalid, therefore, is not on this record a "decision in favor of its validity", and does not raise a question within the jurisdiction of this Court.

A "failure to rule" a state statute invalid can give jurisdiction to this Court only where such "failure to rule" *necessarily* gives effect to such statute, and constitutes a "decision in favor of its validity", within the meaning of 28 U.S.C., s. 344. In the normal case of this type the *suit in the state court is authorized by the state statute* which is "drawn into question". The *defendant relies on a prior contract* which he says is impaired by the statute. In such a case, the entry of judgment for the plaintiff is a "failure

to rule" the statute invalid. Moreover, it necessarily gives effect to the statute, constitutes a "decision in favor of its validity", and therefore creates a case within the jurisdiction of this court. *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 486, 492-495, and cases cited.

A slightly weaker case of the same type is that in which some essential factor of the plaintiff's cause of action, such as a demand, or administrative determination of liability, is made under authority of a state statute post-dating the contract relied upon by defendant and claimed by him to be impaired. In such a case the entry of judgment for plaintiff necessarily upholds the validity of the state statute. Accordingly, if the state court, in such a case, "fails to rule" the statute invalid, it *necessarily* gives effect to the statute, for its judgment could be entered on no other theory. *Carondelet Canal & Nav. Co.* v. *Louisiana*, 233 U. S. 362, 376-377. *Houston & I.C.R. Co.* v. *Texas*, 177 U. S. 66, 76-77.

In the case at bar the plaintiff relies, not on the statute alleged to impair a contract, but seeks to enforce the "contract" itself, i.e., an alleged trust of Boston Common. There are few cases of this type in which a mere failure to rule the statute invalid gives jurisdiction to this Court. If the state court dismisses such a suit on the ground that the alleged contract never existed, its failure to rule the statute invalid obviously does not give effect to the statute, and is not a "decision in favor of its validity".

Where, however, the record in such a case affirmatively establishes the existence of the contract relied upon the plaintiff, a failure to rule the subsequent statute invalid may constitute a "decision in favor of its validity". In *Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, plaintiff was shown by the record to hold, under a New Jersey statute of 1790, an exclusive franchise to operate a toll bridge for the passage of pedestrians and vehicles.

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Plaintiff sued to restrain the erection by defendants of a railroad bridge at the same location. Defendants were acting under a franchise granted by a New Jersey statute of 1860. The state court dismissed the bill on the ground that the word "bridge", as used in the grant of 1790, did not, fairly construed, include the type of structure to be constructed by defendants. The state court in terms rested its decision on a construction of the original grant of 1790, and did not purport to give effect to the statute of 1860. This Court held nevertheless, that the judgment below necessarily gave effect to the statute of 1860.

> ". . . The state court dismissed the bill on these pleadings alone. It could not have done this, without holding *the act of 1860* to be valid, as it *was the only authority on which the defendants rested their right to build any structure* over the Hackensack river. In holding that act to be valid, notwithstanding plaintiff's claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789." (*Bridge Proprietors* v. *Hoboken Company*, 1 Wall. 116, 144; emphasis supplied).

In the *Hoboken* case, unlike the case at bar, the existence of the contract relied upon by the plaintiffs was affirmatively established by the record. They were entitled to enjoin the building of defendant's bridge, as a nuisance causing special damage to them, unless defendants could show lawful authority to build it. Defendants could only show this by relying on the later statute of 1860. A decision dismissing the bill could only be justified by the 1860 statute, "the only authority on which the defendants rested their right to build any structure". Consequently, the decision below necessarily gave effect to the 1860 statute and gave rise to a case within the jurisdiction of this Court. Similar considerations justify the jurisdiction assumed in *Charles*

River Bridge v. *Warren Bridge*, 11 Peters 420, and in *Larson* v. *South Dakota*, 278 U. S. 429. Compare *Chenango Bridge Co.* v. *Binghampton Bridge Co.*, 3 Wall. 51, where the bill was brought by the grantee under the later statute, and the state court issued an injunction against the earlier grantee, thus necessarily giving effect to the later statute.

III. The Decision Below Does Not Expressly or Impliedly Give Effect to Mass. St. 1946, c. 294, Assignment of Error No. 6 Is Not Borne Out by the Record, and Therefore the Motion to Dismiss or Affirm Should Be Allowed.

Assignment of Error No. 6 is as follows:

> 6. That the court below erred in ruling that St. 1946 c. 294 was a valid exercise of the legislative power of the Commonwealth of Massachusetts.

The record shows that no such ruling was made by the Court below in this case. The Court below did not in this case decide in favor of the validity of Mass. St. 1946, c. 294, nor give it effect.

The decree in this case adequately rests on the finding made by the Court below that no trust of the land known as Boston Common resulted from the acceptance by the City of a bequest of money under the will of George Francis Parkman. (Opinion, Mass. Adv. Sh. (1948) pp. 632-635.) That finding in itself, without more, compelled a dismissal of the petition in this case. Since the decree rests on a finding entirely independent of Mass. St. 1946, c. 294, it does not impliedly give effect to the statute.

The petition in this case in no way draws into question the constitutionality of Mass. St. 1946, c. 294. It alleges the acceptance by the City in 1909 of a monetary bequest under the will of George Francis Parkman (Petition, par. 2) and alleges in vague terms that the city thereby became bound

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not to divert the Common from its previous uses, and that it is about to commit acts which violate that obligation. (Petition, par. 5.) The Petition in no way mentions Mass. St. 1946, c. 294. The Court found that no such obligation was imposed upon the City by its acceptance of the Parkman bequest. (Opinion, Mass. Adv. Sh. (1048) pp. 632-635.) That finding is sufficient in itself, without more, to compel a dismissal of the petition. No reference to or reliance on Mass. St. 1946, c. 294 is necessary to support that dismissal, and the decree, therefore, in no way gives effect to or holds valid Mass. St. 1946, c. 294. Since the decree rests in no way on Mass. St. 1946, c. 294, and would have been precisely the same had the statute never been passed (*Kreiger* v. *Shelby R. R. Co.*, 125 U. S. 39, 46; *Missouri & Kansas Interurban Ry. Co.* v. *Olathe*, 222 U. S. 187, 190), it does not, of course, impliedly give effect to the statute. Appellants, therefore, are driven to argue that the Opinion of the Supreme Judicial Court *expressly* gave effect to Mass. St. 1946, c. 294. The only portion of the Opinion which considers that statute occurs at pp. 626-632 of Mass. Adv. Sh. (1948). The remainder of the opinion neither considers nor rests in any way upon the statute. Pages 605-608 state the three cases before the Court. Pages 608-624 are concerned with the "controversy as to the nature of the title which the town obtained . . ." in 1634 (p. 610), including the question whether "the town took the land subject to a trust". (p. 620). On pages 624-626 occurs the holding that "the town has dedicated the Common and the Public Garden to the use of the public as a public park". (p. 624). As we have said, pages 626-632 deal with Mass. St. 1946, c. 294, and will be fully discussed below. After concluding its discussion of that statute, the Court passes to the *Pierce* case and the *McCarthy* case (the case at bar). (p. 632). Pages 632-635 are concerned with the trust of the Common alleged to have arisen from the City's acceptance

of the Parkman will. Pages 635-636 discuss the decrees to be entered in the three cases.

We now direct attention to the discussion by the Supreme Judicial Court, at pages 626-632, of the validity of Mass. St. 1946, c. 294. The following propositions will appear:

1. The Court's discussion of the validity of Mass. St. 1946, c. 294 is expressly limited by it to the Lowell case.

2. The discussion is confined to the validity of the statute under the Massachusetts constitution.

3. Occasion to discuss the validity of the statute arose in the Lowell case alone, because *the finding that the Common is held in trust is not sufficient in itself to justify a dismissal of the Lowell petition.* That petition relied on a dedication of the land, as well as on a trust, and alleged that the dedication would be infringed by Mass. St. 1946, c. 294, in violation of the Constitution of Massachusetts.

That the Court's discussion of the validity of Mass. St. 1946, c. 294, is confined to the *Lowell* case is made plain by the language of the opinion. The Court begins its discussion by a statement of Mass. St. 1946, c. 294 (pp. 626-628). It then stops to consider whether action by the City pursuant to Mass. St. 1946, c. 294, can on any theory amount to the incurring of an obligation within Mass. G. L. (Ter. Ed.) c. 40, s. 53, the statute under which the petition is brought. The Court resumes its consideration of the validity of St. 1946, c. 294, at the bottom of p. 629, with this sentence:

> "Still confining our discussion to the Lowell petition, we pass to a consideration of the validity of St. 1946, c. 294 . . ."

Not until the termination of that discussion does the Court pass to the *Pierce* and *McCarthy* cases (Bottom of p. 632).

The Lowell petition, unlike the other two, is not a bill to enforce a trust. It is brought under Mass. G. L. (Ter. Ed.) c. 40, s. 53:

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> "If a town or any of its officers or agents are about to raise or expend money or incur obligations purporting to bind said town for any purpose or object or in any manner other than that for and in which such town has the legal and constitutional right and power to raise or expend money or incur obligations, the supreme judicial or superior court may, upon the petition of not less than ten taxable inhabitants of the town, determine the same in equity, and may, before the final determination of the cause, restrain the unlawful exercise or abuse of such corporate power."

The gist of the case is not breach of trust but "unlawful exercise . . . of corporate power", *i.e.*, unlawful raising or expending of money or incurring of obligations. (Opinion, Mass. Adv. Sh. (1948) p. 605). The case is that action under Mass. St. 1946, c. 294, will constitute such abuse of corporate power, because the statute is unconstitutional. The unconstitutionality is urged on two grounds: (1) Mass. St. 1946 impairs a trust with respect to the common, (2) Mass. St. 1946, c. 294, unlawfully infringes a dedication of the Common by authorizing the conveyance of an interest therein to a private corporation for purposes of private profit. The finding that there is no trust with respect to the Common obviously disposes of the first ground upon which it is claimed that action by the City under Mass. St. 1946, c. 294 will be an abuse of corporate power under Mass. G. L. (Ter. Ed.) c. 40, s. 53. It does not dispose of the second ground. The Supreme Judicial Court did find that the Common had been *dedicated* to public uses. (Opinion, Mass. Adv. Sh. (1948) p. 624.) Plainly, the Court felt that it must meet the claim that Mass. St. 1946, c. 294, interfered with that dedication in violation of the State Constitution.

Such is the reason for the Court's consideration of the validity of Mass. St. 1946, c. 294. Naturally the discussion is confined to the *Lowell* case, since the other two cases are

completely disposed of by the finding that the Common is not held upon trust. Plainly, the discussion in no way touches upon the Federal Constitution, and is confined to the question of the validity of the statute under the Constitution of Massachusetts.

It thus appears clearly that the Supreme Judicial Court did not uphold the validity of or give effect to Mass. St. 1946, c. 294 in the case at bar. That conclusion is powerfully confirmed by the express refusal of the Court, in the companion *Pierce* case, which also depended solely upon proof that the Common is held upon trust, to grant the City's prayer for a declaration that the statute is constitutional. (Opinion, Mass. Adv. Sh. (1948) p. 635.) *The Court did not uphold, but expressly refused to uphold the validity of Mass. St. 1946, c. 294.* It follows that this Court has no jurisdiction of the Appeal, and that the Motion to Dismiss or Affirm should be granted.

Wilson v. *Cook*, 327 U. S. 474, 480-481.

Long Sault Development Co. v. *Call*, 242 U. S. 272, 276-278, 280.

Crosslake Club v. *Louisiana*, 224 U. S. 632, 638-639.

Missouri & Kansas Interurban Ry. Co. v. *Olathe*, 222 U. S. 187, 190.

Bacon v. *Texas*, 163 U. S. 207, 226-227.

Kreiger v. *Shelby R. R. Co.*, 125 U. S. 39, 46.

New Orleans Waterworks v. *Louisiana Sugar Co.*, 125 U. S. 18, 30.

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Conclusion

For the various reasons set forth above, it is submitted that appellee's motion to dismiss or affirm should be allowed with costs to the appellee.

Respectfully submitted,

JAMES W. KELLEHER,
Assistant Corporation Counsel,
WILLIAM H. KERR,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 325

ANNA C. McCARTHY ET AL.,

Appellants,

vs.

THE CITY OF BOSTON,

Appellee

MOTION TO DISMISS OR AFFIRM

Now comes the City of Boston, the appellee in the above-entitled appeal, and moves that said appeal be dismissed, or the decision and decree appealed from be affirmed, for the reasons set forth in the appellee's Statement Opposing Jurisdiction filed herewith.

JAMES W. KELLEHER,
Assistant Corporation Counsel,
and
WILLIAM H. KERR,
Counsel for Appellee.

No. 324. PIERCE ET AL. *v.* BOSTON; and

No. 325. MCCARTHY ET AL. *v.* BOSTON. Appeals from the Superior Court of Massachusetts, County of Suffolk. *Per Curiam:* The motions to dismiss are granted and the appeals are dismissed for want of a substantial federal question. *Frank W. Grinnell* and *Richard Wait* for appellants. *William H. Kerr* for appellee. Reported below: No. 324, see 322 Mass. 709, 79 N. E. 2d 713.